In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-927

BANKERS LIFE AND CASUALTY COMPANY, PETITIONER

v.

THE VILLAGE OF NORTH PALM BEACH, FLORIDA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. A1–A7) is not reported. The opinion of the court of appeals (Pet. App. A8–A24) and the modifications on rehearing (Pet. App. A25–A26) are reported at 469 F.2d 994.

JURISDICTION

The judgment of the court of appeals as modified was entered on September 25, 1972 (Pet. App. A25). The petition for a writ of certiorari was filed on December 26, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court erred in ordering the Corps of Engineers to renew a permit to dredge and fill, which had expired more than five years previously, where the legality of the construction under state law was under litigation and the environmental impact of the permit renewal had not been studied by the Corps.

STATEMENT

In 1957, the Corps of Engineers granted Bankers Life and Casualty Company (Bankers) a permit to fill approximately 194 acres of submerged lands in Lake Worth, Florida, within the Village of North Palm Beach (Pet. App. A9). The permit was for a three-year period. Pursuant to a timely application made in 1960, it was extended an additional three years to December 1963. Just prior to the expiration of the permit in December 1963, the Trustees of the Internal Improvement Fund, the agency of the State of Florida having jurisdiction over this matter, wrote the Corps of Engineers requesting that any extension of Bankers' permit be deferred pending Bankers' receipt of a local fill permit from the village in accordance with state law (Pet. App. A8–A10). The Corps thereupon informed Bankers by a letter dated December 27, 1963 (Pet. App. A10) that it would not grant an extension if work would be in contravention of state or local law, but that it would "be pleased to grant the extension promptly upon withdrawal of the deferral request by the Trustees of the Internal

Improvement Fund" and that "[t]he lapse in the permit will have no effect insofar as the Corps of Engineers is concerned" (Pet. App. A10, n. 1).

More than five years then passed without a request for renewal of the lapsed permit (Pet. App. A10–A11). In June 1969, the Village of North Palm Beach notified Bankers that it would issue a local fill permit but in July the Village notified Bankers that it had rescinded the action (Pet. App. A11). On the same date that the Village rescinded its decision to grant a permit, Bankers requested the Corps to extend its lapsed permit. The Corps of Engineers again requested Bankers to furnish it with the written approval of the Trustees of the Internal Improvement Fund (Pet. App. A11). Bankers then brought this suit to compel the District Engineer of the Corps of Engineers, the Secretary of the Army and the United States to renew the permit or to issue a new permit (Pet. App. A12). Bankers also sought a resolution of various issues between it and the Village of North Palm Beach and the State. The district court held that neither the Village nor the State had authority to prevent the construction in question and ordered the federal defendants to issue an extension of the Corps of Engineers permit to dredge and fill (Pet App. A13).

The court of appeals reversed the judgment and remanded the case to the district court with instructions to dismiss the suit against the federal defendants and to reconsider the various issues of state law. The court noted that in the more than five years since the

federal permit had lapsed the National Environmental Policy Act of 1969, 42 U.S.C. 4331–4347, had been enacted and that it would be improper for the Corps to reissue the permit without taking into consideration environmental factors that might not have been considered previously (Pet. App. A14). The court also found that the length of time that had passed since the expiration of the permit was attributable to inaction on Bankers' part in challenging the state statute (*ibid.*). The court concluded that, as to the federal defendants, the matter before the court was not ripe for judicial action since the government official empowered to act had not been permitted to exercise his investigative and at least partially discretionary powers imposed by federal statutes (Pet. App. A16).[1]

ARGUMENT

The decision of the court of appeals, based on an opinion (Pet. App. A8—A26) on which we principally rely, presents no question warranting review by this Court.

1. The decision below simply recognizes that before a permit to dredge and fill may be issued by federal officials consideration must be given to the provisions of applicable environmental legislation. Consequently, the renewal of such a permit more than five years after its termination and after the intervening passage of the Environmental Policy Act is not a ministerial duty that can properly be ordered by in-

[1] We do not here discuss the issues of Florida law considered by the court below, which are the subject of the remand for further proceedings.

junction or mandamus. The court of appeals correctly found (Pet. App. A15) that the conditions of the Corps' letter of December 23, 1963, had never been fulfilled and that nothing in the letter would free the Corps from the duty of taking into account current congressional enactments in determining whether to renew the permit. *Zabel* v. *Tabb*, 430 F. 2d 199, 213 (C.A. 5), certiorari denied, 401 U.S. 910.

2. It makes no difference that some ecological factors may have been considered by the Corps in extending Bankers' permit in 1960. Such consideration does not preclude their being considered again along with others in the light of new legislation and perhaps changed circumstances when the decision on renewal is made. What petitioner in effect seeks is to convert a lapsed permit (and a letter containing conditions that it has never met) into a contract right prohibiting the exercise of discretion by the government in a determination that by Act of Congress requires an exercise of discretion.

Petitioner's suggestion that the court of appeals did not follow its own precedent in *Zabel* v. *Tabb*, *supra*, ignores the clear language of the court's opinion in that case (430 F. 2d at 213):

> Although this Congressional command was not in existence at the time the permit in question was denied, the correctness of that decision must be determined by the applicable standards of today. The national policy is set forth in plain terms in § 101 and the disclaimer of § 104(3) neither affects it nor the duty of all departments to consider, consult, collaborate and conclude. * * *

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.

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